STATE OF MICHIGAN

IN THE SUPREME COURT

MICHAEL BANKS,

Plaintiff-Appellant,

-vs-

EXXON MOBIL CORPORATION, d/b/a WIXOM MOBIL ON THE RUN, ~~a New York corporation~~; and ROBERT PEMBE,

Defendants-Appellees,

and

DEBRA SALISBURY,

Defendant.

Supreme Court No. _____

Court of Appeals No. 257902 Grn 3/16/06

Oakland County Circuit Court
No. 03-049526-NO

N. Grant

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NOTICE OF HEARING

PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

CERTIFICATE OF SERVICE

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ORDER BEING APPEALED FROM AND RELIEF REQUESTED

Plaintiff-appellant, Michael Banks, seeks leave to appeal from the Michigan Court of Appeals decision dated March 16, 2006. A copy of that Opinion is attached hereto as Exhibit D. That decision affirmated a circuit court ruling granting summary disposition to the defendant in this action.

Plaintiff-appellant requests that this Court grant leave to appeal to consider the legal questions presented in this case. Alternatively, plaintiff-appellant requests that the Court summarily reverse the Court of Appeals' March 16, 2006 decision and remand this matter to the Oakland County Circuit Court for further proceedings.

STATEMENT OF QUESTIONS PRESENTED

I. SHOULD THIS COURT GRANT LEAVE TO APPEAL TO CONSIDER THE QUESTION OF WHETHER THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE DEFENDANTS WERE ENTITLED TO SUMMARY DISPOSITION BECAUSE THERE WAS INSUFFICIENT EVIDENCE PRESENTED ON WHETHER THE DEFENDANTS EITHER KNEW OR SHOULD HAVE KNOWN OF THE DANGEROUS CONDITION WHICH CAUSED MR. BANKS' INJURY?

Plaintiff-Appellant says "Yes".

Defendants-Appellees say "No".

II. SHOULD THIS COURT GRANT LEAVE TO APPEAL TO CONSIDER THE QUESTION OF WHETHER THE DEFENDANTS' MOTION FOR SUMMARY DISPOSITION SHOULD HAVE BEEN DENIED WHERE THE DEFENDANTS WERE RESPONSIBLE FOR THE SPOILATION OF A PIECE OF RELEVANT EVIDENCE, A VIDEOTAPE OF THE INCIDENT IN WHICH MR. BANKS WAS INJURED?

Plaintiff-Appellant says "Yes".

Defendants-Appellees say "No".

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

This is a personal injury action brought by plaintiff-appellant, Michael Banks, arising out of an accident which occurred on May 25, 2000, while he was pumping gasoline at a service station owned and operated by the defendants.

In the late afternoon of May 25, 2000, Mr. Banks stopped for gas at an Exxon Mobil service station located on Grand River in the City of Wixom. The station consists of a small convenience store and a number of self service gasoline pumps located both to the north and south of the store. After driving into the station Mr. Banks stopped his car next to a pump located on the south side of the store. The pump had three different dispensers, one for regular gas, one for mid grade and one for premium. (Deposition of Michael Banks, pp. 24-25). When he stopped his car Mr. Banks noticed that one of these three nozzles with its attached hose was lying on the ground. (Banks Dep., p. 24). Mr. Banks tried to replace the dispenser which was lying on the ground onto the pump's holster, but the nozzle was sufficiently damaged that it would not stay attached to the pump. (*Id.*, p. 25). Mr. Banks placed the broken nozzle back onto the ground. (*Id*).

Mr. Banks selected one of the other two grades on the pump and began pumping gas into his car. As he began to do so, the handle which he was holding in his hand became detached from the nozzle which extended into his gas tank. (*Id.*, p. 26). When the handle and nozzle broke apart gasoline splashed onto Mr. Banks's face and clothing. (*Id.*, p. 26-28). Some of the gasoline which splashed into Mr. Banks's face went into his left eye causing serious and permanent chemical injury to that eye.

At the time this accident occurred, there were two employees working at the station. (Deposition of Debra Salsbury, p. 21). One of these two employees was the station's Assistant

Manager, Debra Salsbury.

Mr. Banks went into the store where both Ms. Salsbury and the other station employee, Kishor Poudel, were each working at a cash register. (Salsbury Dep., p. 22). As Mr. Banks entered the store, Ms. Salsbury could smell a strong odor of gasoline on his clothing and she saw that his face was covered with gasoline. (*Id.*, p. 27). Mr. Banks was upset and yelled at Ms. Salsbury that she had to turn off the damaged pump. (*Id.*).

Mr. Banks was at first insistent that Ms. Salsbury go with him immediately to examine the defective pump. (*Id.*, pp. 27-28). Ms. Salsbury could see, however, that Mr. Banks' eyes were already becoming red and swollen and she asked him to first rinse out his eyes. (*Id.*, pp. 29-30).

After Mr. Banks tried to rinse the gasoline out of his eyes, he and Ms. Salsbury went together to look at the damaged pump. Ms. Salsbury saw one of the pump's nozzles laying on the ground. (*Id.*, p. 30). She also noticed that the nozzle had several dents in it. (*Id.*). Ms. Salsbury also observed that the facing of the pump itself had two or three dents in it. (*Id.*, p. 31). She immediately came to the conclusion that a vehicle must have driven into the pump. (*Id.*, p. 32).

After Mr. Banks reported the incident to her, Ms. Salsbury called a phone number which she had been instructed to call to report to Exxon Mobil any accidents or incidents occurring on the premises. (*Id.*, pp. 55-56). The station is equipped with video cameras which are designed to transmit and record the activities taking place around the station's pumps. The representatives of Exxon Mobil whom she spoke to immediately after Mr. Banks's accident instructed Ms. Salsbury to pull the videotape of the incident from a recording machine located in the back room of the store. (*Id.*, p. 56). That videotape, which Ms. Salsbury later examined, recorded, among other things, the area around the pump which Mr. Banks had been using at the time the gasoline splashed on him.

(*Id.*, p. 62).

Ms. Salsbury later turned over the videotape and everything else related to this incident to an Exxon Mobil Territory Manager, Mark Hotchkiss. (*Id.*, p. 106). Among the items which Ms. Salsbury turned over to Mr. Hotchkiss was a tape of one of the station's cash registers which recorded the amount of gasoline pumped from each pump and the time that the gasoline was pumped. (*Id.*, p. 106).

On May 2, 2003, Mr. Banks filed this action in the Oakland County Circuit Court. Named as defendants in the case were the owners of the station, Exxon Mobil Corporation, and the station's manager at the time Mr. Banks was injured, Robert Pemberton.[1]

During the discovery phase of the case, plaintiff deposed Ms. Salsbury. She testified at her deposition that it was the responsibility of the employees working in the station's store to be continually aware of what was going on at the pumps. Thus, Ms. Salsbury testified that where two people were working the cash registers inside the store, as they were on May 25, 2000, each was responsible for watching the pumps located on the side of the store that they were on. (Salsbury Dep., pp. 98-99). Ms. Salsbury testified:

> We were to watch the parking lot as each pump was being used, and then once it was turned on, between waiting on customers it was your responsibility to glance out there and make sure that person was still there.
>
> Salsbury Dep., p. 98.

Since Ms. Salsbury's co-worker on May 25, 2000, Mr. Poudel, was working on the cash register on the south side of the store, it was Mr. Poudel's job to watch the pump that Mr. Banks attempted to

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[1]A third defendant named in the case was Debra Salsbury. Ms. Salsbury was never served with a copy of the plaintiff's Complaint and, as a result, is not a party to this action.

use on that date. (*Id.*, p. 101).

During the course of discovery, plaintiff's counsel was supplied with the cash register record which recorded the time that gas was pumped and the amount of gas pumped from each of the station's pumps. Attached hereto as Exhibit A is a copy of the relevant cash register record. These records indicate that Mr. Banks began pumping gasoline at 5:18:42 p.m. and that he pumped only 23 cents worth of gasoline into his tank before he was splashed with the fuel and he stopped the pump. The records further show that approximately 3-1/2 minutes before Mr. Banks arrived at the station, the same pump had been turned on, but only one cent of gas had been pumped before the customer turned the pump off. The cash register tape also reflected that at 5:12:12, exactly 6-1/2 minutes before Mr. Banks tried to use the pump, a sale of $25.68 was recorded on the same pump that Mr. Banks later tried to use.

During the course of discovery, plaintiff also learned of the existence of the surveillance videotape of the defendants' station, which Ms. Salisbury had been instructed to remove and which she later turned over to Exxon Mobil's Territory Manager. Counsel for Mr. Banks requested that a copy of that videotape be produced. The defendants, however, refused to turn over the videotape, claiming that it could not be located. On May 19, 2004, plaintiff filed a motion to compel production of the surveillance videotape.

On June 23, 2004, the circuit court entered an order compelling Exxon Mobil to produce the videotape within 21 days or to formally notify the court and plaintiff's counsel that the videotape could not be located. Twenty-one days later, on July 14, 2004, counsel for defendant filed a document indicating that the surveillance videotape could not be found.

Two weeks after notifying plaintiff that the missing videotape would not be produced, the

defendants filed a motion for summary disposition. In that motion, the defendants argued that they were entitled to judgment as a matter of law because the defendants' agents did not have sufficient notice of the defective condition of the pump which Mr. Banks used on May 25, 2000, prior to the time that he sustained his injury.

Plaintiff filed a brief in response to the defendants' motion. With that brief, plaintiff filed the affidavit of an expert, George J. Greene. Attached hereto as Exhibit B is a copy of Mr. Greene's Affidavit.

Oral argument was held on the defendants' motion on August 25, 2004. On August 26, 2004, the circuit court issued an Opinion and Order granting the defendants' motion. Attached hereto as Exhibit C is a copy of the circuit court's August 26, 2004 Opinion. In that Opinion, the circuit court ruled as a matter of law that the defendants' agents did not have actual or constructive notice of the condition which caused Mr. Banks's injury. The circuit court's analysis of this notice issue was confined to a single paragraph in its August 26, 2004 Opinion:

> The Court finds that this evidence is insufficient to establish actual notice, as it is not reasonable to expect Defendants to infer from a one-cent sale that the pump was dangerous to other customers. Nor is the evidence sufficient to establish constructive notice, even when viewed in the light most favorable to Plaintiff. The evidence establishes, at most, the hose had been damaged for only eight minutes before Plaintiff used it and was injured. The Court does not believe that this is a sufficient amount of time in which Defendants could reasonably have been required to discover the condition. Therefore, there is no basis for a finding that Defendants knew or should have known of the dangerous condition that caused Plaintiff's injury, and summary disposition is appropriate.
>
> Opinion (Exhibit C), p. 2.

Mr. Banks appealed the circuit court's ruling to the Michigan Court of Appeals. In that Court

Mr. Banks made two arguments of relevance to this Application. He first contended that the circuit court had erred in ruling as a matter of law that the defendants either knew or should have known of the dangerous condition at its station which resulted Mr. Banks's injuries. Second, plaintiff argued that summary disposition should be precluded in this case because Exxon Mobil took possession of a videotape which recorded this incident and, despite an order for its production did not supply a copy of that videotape to the plaintiff, claiming that it had been lost.

On March 16, 2006, the Court of Appeals issued an unpublished decision affirming the circuit court's decision granting summary disposition. Attached hereto as Exhibit D is a copy of that Opinion. The Court of Appeals first ruled that there was insufficient evidence of constructive notice to present Mr. Bank's claim to a jury:

> In this case, the trial court properly concluded that the evidence would allow a jury to infer that the hose that caused plaintiff's injuries was damaged, at most, approximately eight minutes before plaintiff used the pump. We agree that this amount of time is insufficient to prove that defendants should have discovered and rectified the hazard. The hazard did not exist for such a length of time that defendants should have had constructive knowledge of it. *Clark, supra.*
>
> Plaintiff argues that the trial court failed to consider that the preceding sale on the same was for only one cent, which should have given defendants notice that the pump was damaged. It is apparent that the trial court took this fact into account because it referred to it in its decision. The one-cent sale occurred less than five minutes before plaintiff used the pump. We agree with the trial court, however, that a one-cent sale was not sufficient to provide notice that there was something immediately wrong with the pump that required immediate action to either turn off or promptly inspect the pump.

Opinion (Exhibit D), p. 2.

The panel further ruled that the defendant's failure to produce the videotape of the incident did not preclude summary disposition from being entered:

> Here, the incident involving plaintiff was captured on a surveillance videotape, but

defendants claimed that the videotape was lost and could not be produced. Plaintiff prevailed in his request for an instruction that a jury would be permitted to draw an inference that the videotape would be adverse to defendants. Nonetheless, the availability of an adverse inference instruction did not preclude summary disposition on the issue of notice.

At oral argument before the trial court, plaintiff's counsel argued that the videotape would have shown that another driver hit the pump before plaintiff used it. While such evidence would have been relevant to show that the fuel pump was damaged, and while defendants' failure to produce the videotape could allow a jury to draw an adverse inference against defendants with regard to the question whether the pump was damaged, it does not permit an inference that defendants had actual or constructive knowledge of the defect.

Id., p. 3.

ARGUMENT

I. THIS COURT SHOULD GRANT LEAVE TO APPEAL OR SUMMARILY REVERSE THE COURT OF APPEALS' RULING ON THE SUBJECT OF WHETHER THERE WAS SUFFICIENT EVIDENCE IN THE RECORD WITH RESPECT TO THE DEFENDANTS' CONSTRUCTIVE NOTICE OF THE DANGEROUS CONDITION EXISTING ON ITS PROPERTY THAT CAUSED INJURY TO THE PLAINTIFF

The Court of Appeals upheld the circuit court's ruling granting summary disposition based on its conclusion that there was insufficient evidence in this record to establish that the defendants could be charged with notice of the defective condition of the gasoline pump which resulted in injury to Mr. Banks. The Court of Appeals was wrong in reaching this conclusion.

There is no question that Mr. Banks was a business invitee while on the defendants' premises on May 25, 2000. The duty which the defendants owed to Mr. Banks as an invitee is well established under Michigan law. As expressed by this Court in *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591; 676 NW2d 213 (2003):

> The landowner has a duty of care, not only to warn the invitee of any known dangers, but the additional obligation to also make the premises safe, which requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards. Thus, an invitee is entitled to the highest level of protection under premises liability law.
>
> *Id.* at 597.

The duty owed by a landowner to a business invitee is not absolute; a landowner is not an insurer of the safety of his/her premises. But, at a minimum, a landowner owes an invitee the affirmative obligation to exercise due care, "to prevent and to obviate the existence of a situation known to it or that should have been known, that might result in injury." *Torma v Montgomery*

Ward & Co., 336 Mich 468, 476; 58 NW2d 149 (1953); *Kroll v Katz*, 374 Mich 364, 371; 132 NW2d 27 (1965).

The central question presented in this case concerns the issue of notice. The circuit court ruled as a matter of law that the defendants did not have sufficient knowledge of the potential danger to Mr. Banks presented by the damaged gasoline pump on their premises. The Court of Appeals affirmed that ruling.

The notice needed to trigger liability in a case of this type may take several forms. As this Court's decisions in *Torma* and *Kroll* make clear, where a landowner has *actual* knowledge of a dangerous condition, he/she is charged with an affirmative obligation to eliminate that danger. More often, however, Michigan case law on this subject has focused on the landowner's constructive knowledge. As expressed in *Torma* and *Kroll*, constructive knowledge focuses on the circumstances in which a reasonably prudent property owner "should have known" of a potentially dangerous condition.

Michigan law clearly provides that constructive knowledge - what the landowner "should have known" - can be established in two different ways. Constructive knowledge may be premised on proof that the dangerous condition which caused injury to an invitee existed for a sufficiently long period of time to provide notice to the landowner. Alternatively, a property owner can be charged with constructive knowledge of a condition on its premises *where the condition itself is of a type which would be sufficient to provide notice to a reasonably prudent invitor.* As expressed by the Court in *Kroll v Katz, supra*, "constructive notice arises not only from the passage of time itself *but also from the type of condition involved* . . ." 374 Mich at 372 (emphasis added).

The Court more recently reiterated this principle of law in *Clark v Kmart,* 465 Mich 416,

418-419; 634 NW2d 347 (2001). In *Clark*, the Court addressed the obligation of a store owner to one of its invitees and it ruled:

> "It is the duty of a storekeeper to provide reasonably safe aisles for customers and he is liable for injury resulting from an unsafe condition either caused by the active negligence of himself and his employees or, if otherwise caused, where known to the storekeeper or *is of such a character* or has existed a sufficient length of time that he should have had knowledge of it."
>
> 465 Mich at 419 (emphasis added), *citing Serinto v Borman Food Stores,* 380 Mich 637, 640-641; 158 NW2d 485 (1968).

Thus, a landowner may be deemed to have constructive notice of a defect on his/her property if that defect existed for a sufficient period of time. Alternatively, the character of the defect alone may be such that a trier of fact might reasonably conclude that the defendant should have known of it. *See also Serinto v Borman Food Stores*, 380 Mich at 640 (1968); *Siegel v Detroit Ice & Fuel Co.*, 324 Mich 205, 211; 36 NW2d 719 (1949) (". . . the character of the defect alone would raise a question of the knowledge of defendant."); *Oppenheim v Pitcairn*, 293 Mich 475, 477-478; 292 NW2d 374 (1940) (constructive notice exists where "*the character of the danger* or the passage of time was such that knowledge of the menace should have come to the menace should have come to the reasonably prudent incumbent.")

There are, therefore, two alternative methods by which constructive notice can be established under Michigan law. The obvious error committed by the Court of Appeals herein is that it confined its analysis exclusively to one of these two methods, while ignoring the other. The Court of Appeals focused solely on that prong of the constructive notice case law which pertains to the length of time that a particular condition existed. The Court of Appeals ruled that summary disposition was

appropriate in this case on the notice issue because the evidence supported the inference that the hose was damaged for less than eight minutes before Mr. Banks used it. Opinion (Exhibit D), p. 2. Thus, the Court of Appeals reached the same conclusion as the circuit court which found in its August 26, 2004 Opinion that defendants were entitled to summary disposition on the issue of constructive notice because the pump "had been damaged for only eight minutes before Plaintiff used it and was injured. The Court does not believe that this is a sufficient amount of time in which Defendants could reasonably have been required to discover the condition." Opinion (Exhibit C), p. 2.

The failure of the Court of Appeals to address the alternative basis for proving constructive notice is particularly important here in light of the deposition testimony of Ms. Salsbury, the defendants' Assistant Manager on duty at the time Mr. Banks sustained his injuries. Ms. Salsbury testified that at the time Mr. Banks sustained his injuries, there were two people working in the station's convenience. As Ms. Salsbury described it, both she and her coworker, Kishor Poudel, were working at the cash registers in the store. (Salsbury Dep., p. 22). Ms. Salsbury was working at the register located on the north side of the store which provided a view of the pumps located on that side of the building. The other employee, Mr. Poudel, was working at the cash register on the south side of the store, facing the pumps located on that side of the building. (*Id.*, pp. 22, 95-96).

In the course of her deposition, Ms. Salsbury was asked to describe the nature of the job responsibilities which she and her co-employee had with respect to making observations regarding what was going on at the pumps. In her testimony, Ms. Salsbury acknowledged that it was part of each employee's job to watch the pumps and to observe how those pumps were being used.

One of the subjects which Ms. Salsbury was asked about at her deposition were "drive-offs," *i.e.* people who drive into a self service station, pump gas into their cars and then leave without

paying. (Salsbury Dep., p. 95). After confirming that "drive offs" were a problem at the defendants' station, Ms. Salsbury testified as to what was expected of the station's employees to prevent "drive offs":

> Q. How did you keep track of that? Were you supposed to watch the pumps at all times to make sure people weren't driving off without paying?
>
> A. *Each cashier would agree amongst themselves that if you were facing the north side, that that sales associate would watch that side of the pumps and watch the register while the customer was pumping gas at the same time that you were waiting on customers.* It was also his responsibility or her responsibility, whoever was manning register 1, to watch his side of the parking lot.
>
> The cash registers would indicate each time a customer would use a gas – would use a pump by lighting up or some type of bell would ring or some kind of notice would ring on the register indicating that the pump was in use. That would give *the sales associate a heads up to glance out there, kind of see if there's, you know, who's using that pump,* and it was discretionary for that sales associate to say, well, you know, there's a bunch of kids out there, you want to keep an eye on them. There was tricks that kids used and people that would drive off of people that, you know, we became accustomed to over the years of watching for and keep a close eye on those situations and prepared to try to get out that door, get a license plage number, call the police if we could get a number and make of the vehicle if the car was driving off.
>
> Salsbury Dep., pp. 95-96 (emphasis added).

Thus, Ms. Salsbury explained that the routine job responsibilities of a person working inside the store required employees to constantly monitor the use of the pumps. Even when an employee was serving customers who were inside the store, that employee was required to always be aware of what was going on at the pumps. Ms. Salsbury further testified:

A. It was our jobs. *It was our jobs to watch that parking lot to make sure we weren't getting drive-offs* and it was our job to wait on the customer base in the store as well.

Q. So were you supposed to constantly watch the parking lot?

A. *We were to watch the parking lot as each pump was being used, and then once it was turned on, between waiting on customers it was your responsibility to glance out there and make sure that person was still there.* There have been incidents in the past where a customer would just lay the nozzle on the ground instead of hanging it up, which would indicate the pump was still in use.

Q. And how would you determine that that had occurred?

A. After the customer was gone and the pump was laying on the ground and they took off and didn't pay for the gas they used.

Q. Meaning what? From your position behind the register you'd look out at that pump and see the hose laying on the ground?

A. Well, you would look out and see a vehicle parked in front of that – or you would see that pump and there wouldn't be a vehicle there anymore, but yet the register would indicate that the pump was still being used.

Salsbury Dep., pp. 97-98 (emphasis added).

Ms. Salsbury's description of her and her co-employees' responsibility to continually monitor the use of the pumps at the defendants' service station is consistent with the guidelines established for self service stations by the National Fire Protection Association (NFPA). The NFPA standards require that the pumps at self-service stations be visible to the station's employees at all times and that the station's employees maintain constant surveillance of those pumps:

> 8-4.3 All attended self-service stations shall have at least one attendant on duty while the station is open for business. The attendant's primary function shall be *to supervise, observe, and control* the dispensing of Class 1 liquids while said liquids are

actually being dispensed.

* * *

8-4.7 *The dispensing area shall at all times be in clear view of the attendant, and the placing or allowing of any obstacle to come between the dispensing area and the attendant control area shall be prohibited.* The attendant shall at all times be able to communicate with persons in the dispensing area."

Id. (emphasis added).

On May 25, 2004, Mr. Banks tried to use a pump located on the south side of the store, the side of the store where Ms. Salsbury's co-worker, Mr. Poudel, was working. Ms. Salsbury confirmed that in these circumstances it was Mr. Poudel's responsibility to be continually observing each of the pumps on his side of the building:

Q. So what I'm getting at is what part of your job as the – I'm trying to get an idea of what you folks did.

If you've got two people like you did at the time of the incident here both manning the registers, you've got to watch your pumps on your side –

A. *Right.*

Q. *– the person at register number 1 would be watching the pumps on their side, correct?*

A. *He's supposed to, yes.*

Q. *So when this occurrence happened, according to Exhibit 3, that would have been Mr. Poudel's responsibility to watching the pumps on the side where this incident occurred?*

A. *Yes.*

Q. Okay. You would have been in charge of pumps on the other side?

A. Yes.

Salsbury Dep., pp. 100-101 (emphasis added).

Ms. Salsbury further testified that one of the things that employees working in the defendants' station had to be particularly attentive to was if one of the pump's nozzles was lying on the ground. Ms. Salsbury explained that when a nozzle was removed from its holster and when that nozzle was replaced in the pump's holster, that fact would be registered on a machine inside the store. As a result, one of the more common methods used by "drive offs" would be to pump the gas and, rather than replacing the nozzle in the pump's holster, these people leave the pump's nozzle on the ground:

> Q. Okay. Well, wouldn't people know who were going to do a drive-off to leave it in the up position and lay the hose down so it looks like it's still being pumped?
>
> * * *
>
> A. It depends on - If there's a deliberate act of a customer coming into the store to steal the gasoline and drive off, that was one of the tactics that they had used over the years.
>
> BY MR. REMICK:
>
> Q. Which is what? Laying down -
>
> A. Is to just lay the pump down, the nozzle, the handle on the ground and just drive away -

Salsbury Dep., p. 99.

When Mr. Banks drove into the defendants' station, he found one of the three nozzles laying on the ground. Moreover, as both the circuit court and the Court of Appeals have confirmed, it is reasonable to assume that this nozzle had been laying on the ground for as long as eight minutes.

Opinion (Exhibit D), p. 2.

Ms. Salsbury's deposition testimony confirms that it was part of Mr. Poudel's job to continually monitor the use of that pump. As Ms. Salsbury also testified, Mr. Poudel, in monitoring the use of that pump, was supposed to pay particular attention to any situation in which one of the nozzles was found on the ground. Here the evidence establishes that one of the nozzles on the pump which Mr. Banks' tried to use had been lying on the ground for approximately eight minutes prior to the time that Mr. Banks used that pump and sustained his injuries.

As indicated by this Court in *Stitt, supra*, a property owner owes its invitees a duty to inspect the premises and make any necessary repairs or warn of any hazards presented. Here, the testimony of the defendants' own Assistant Manager confirms that the defendants' employees *should have been* monitoring all of the pumps on the premises, including the pump that Mr. Banks tried to use. Since, by Ms. Salsbury's own acknowledgment, Mr. Poudel *should have been* continually monitoring the pumps, it is clear that the one of the defendants' agents *should have known* of a potential danger associated with the damaged pump, particularly where that damage left one of the pump's nozzles resting on the ground.

As noted previously, constructive knowledge under Michigan law may be found where the "character of the defect alone would raise a question of the knowledge of the defendant." *Siegel*, 324 Mich at 211. Here, the character of the defect *should have provided* constructive knowledge to the defendants because, as Ms. Salsbury testified, *the defendants' agents were supposed to be constantly monitoring the pumps for just such defects*.

This is, therefore, a classic case in which the nature of the defect provided the constructive knowledge necessary to support the plaintiff's claim. Here, the testimony presented fully supports

the view that if the defendants' agents had been acting in a reasonable manner, i.e., if the defendants' agents had been performing the routine assignments of their jobs, the nature of the damage done to the pump should have provided the defendants' agents with all of the information they needed to observe the damaged pump, inspect that pump, and take the necessary steps to ensure that no other customer used that pump until it was repaired.

Unfortunately, neither the circuit court in granting summary disposition nor the Court of Appeals in affirming that ruling chose to address this evidence which was central to the constructive notice issue on which this case was decided. This is clear error which should be reversed.

In addition to the character of the damage itself, there is other evidence in the record which should have put defendants' agents on notice that there was a problem with this pump. That evidence is derived from the cash register tape (Exhibit A), which indicated that several minutes before Mr. Banks tried to pump gas into his car, another customer turned on the same pump and pumped one cent of gas into his/her car. This one cent sale would be conveyed electronically to the employees working in the store. This minuscule sale should have provided additional information to the defendants' employees that something was amiss with respect to this pump.

The importance of this evidence concerning a one cent sale minutes before Mr. Banks arrived was addressed in the affidavit signed by plaintiff's expert, George J. Greene, which was submitted in response to the defendants' motion for summary disposition. *See* Exhibit B. Mr. Greene explained in his affidavit as follows:

> 8. That at 5:15:17 p.m., Exxon Mobil register tapes reveal that one cent was pumped from the special hose at pump number 12.
>
> 9. *That the one cent being pumped would have required an*

Exxon Mobil employee to turn on that pump, allow one cent of gas to be pumped and required payment and/or inquiry in regard to the one cent of gas being pumped. that Exxon Mobil employees would have known immediately that one cent (1¢) worth of gas was pumped from the special hose on pump number 12, which should have generated an inquiry by Exxon Mobil employees.

* * *

18. That the presence of the regular hose lying on the ground and *the one cent of special gas being pumped from pump number 12 at 5:17 p.m., placed defendant, Exxon Mobil, on notice that there was a problem with pump number 12 and should have generated an inquiry immediately by Exxon Mobil employees as to why the regular pump hose was laying on the ground and why a customer had pumped only on cent of gas from the special pump nozzle at pump number 12.*

19. That defendant, Exxon Mobil employees were on notice of a problem with pump number 12, three to five minutes before Mr. Banks used the pump. Had defendant, Exxon Mobil

Greene Affidavit (Exhibit B), ¶¶ 8-9, 18-19

The issue on which this case was decided, constructive notice, is governed by an objective test of reasonableness - what a reasonably prudent property owner *should have known* of a potential danger existing on the premises. As with most other objective, reasonableness tests in the law, the determination of whether a prudent landowner had constructive notice of a particular condition is generally reserved for the trier of fact, not for the courts. This Court recognized that fact in *Kroll, supra*, where the Court cited with approval the following language from *Cruz v City of Saginaw*, 370 Mich 4785; 122 NW2d 670 (1963):

> Generally, the question whether a street defect, otherwise actionable against the municipality, 'has existed a sufficient length of time and under such circumstances that the municipality is deemed to have had notice *is a question of fact, and not a question of law."*

374 Mich at 371 (emphasis added)

The Court's observation in *Kroll* that constructive notice is ordinarily an issue for the trier of fact has been repeated in other decisions of this Court. *See Goldsmith v Cody*, 351 Mich 380, 388; 88 NW2d 268 (1958); *Hendershott v City of Grand Rapids*, 142 Mich 140, 143; 105 NW140 (1905).

In considering a motion for summary disposition, Michigan courts are compelled to construe all of the facts presented as well as the reasonable inferences derived from those facts in the light most favorable to the plaintiff. *Maiden v Rozwood,* 461 Mich 109, 119-120; 597 NW2d 817 (1999); *Quinto v Cross & Peters Co.*, 451 Mich 358, 362; 547 NW2d 314 (1996). In deciding such a motion, the circuit court's function is, in fact, extremely limited. The court is only to address the question of whether a genuine issue of material fact exists. *Skinner v Square D Co.*, 445 Mich 153, 161; 516 NW2d 475 (1994); *Durant v Stahlin*, 375 Mich 628, 646-647; 135 NW2d 392 (1965). In addressing the limited question of whether material facts remain in dispute, the court is not to weigh the facts, it is not to make findings of fact and it is not to assess the credibility of witnesses. *Skinner, supra*; *Citizens Insurance Company of America v ACIA*, 179 Mich App 461, 464; 446 NW2d 482 (1989) (a court deciding a motion under MCR 2.116(C)(10) "must carefully avoid making findings of fact under the guise of determining that no issues of material fact exist."); *Assemany v Archdiocese of Detroit*, 173 Mich App 752, 759; 434 NW2d 233 (1989).

In deciding the issue of constructive notice as a matter of law, the Court of Appeals exceeded the limited role assigned to the judiciary in the summary disposition process and it usurped the role reserved for the trier of fact. The question of whether a reasonable property owner in the position of the defendant *should have known* of a potential problem associated with one of its pumps is not a question which, under the facts of this case, could or should have been decided by a court as a

matter of law. The Court of Appeals erred in affirming the grant of summary disposition on this issue.

II. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY DISPOSITION ON THE ISSUE OF CONSTRUCTIVE NOTICE WHERE THERE REMAINED AN OUTSTANDING ISSUE CONCERNING THE APPROPRIATE SANCTION TO BE IMPOSED ON THE DEFENDANTS FOR THEIR FAILURE TO PRODUCE A VIDEOTAPE OF THIS INCIDENT.

The defendants maintained a surveillance videotape system in their service station. On the day of this incident, Ms. Salsbury reported the circumstances of Mr. Banks' injury to representatives of Exxon Mobil. Ms. Salsbury was instructed by an Exxon Mobil representative to remove the videotape which had recorded the pump area at the time of the incident involving Mr. Banks. (Salsbury Dep., p. 56). Ms. Salsbury did as she was instructed. Later that night, Ms. Salsbury viewed the tape with Exxon Mobil's Territory Manager, Mark Hotchkiss. (*Id.*, pp. 57-58). Ms. Salsbury turned over to Ms. Hotchkiss a number of items related to the incident involving Mr. Banks, including the videotape and the cash register records. (*Id.*, p. 106). During the course of this litigation, the cash register records were turned over to the plaintiff and the contents of these records were prominently featured in the motion and brief which defendants later filed seeking summary disposition. The defendants, however, never turned over the videotape, which was last known to be in the hands of Exxon Mobil's Territory Manager, Mr. Hotchkiss.

After making a discovery request for the videotape, plaintiff filed a motion to compel its production. When counsel for the defendants indicated that the videotape could not be located, the circuit court issued an order dated June 23, 2004, specifying that either the videotape was to be produced within 21 days or the defendants were to formally notify the court and counsel that it could

not be located. On July 14, 2004, the defendants submitted notice that the videotape could not be found.

The defendants are, therefore, responsible for the loss of a videotape which unquestionably contains evidence of relevance to this litigation.[2] There is a significant body of Michigan law bearing on the steps which a court may take where a party has lost or spoiled evidence of relevance to a case. The Michigan Court of Appeals has recognized that a court "has the authority, derived from its inherent powers, to sanction a party for failing to preserve evidence that it knows or should know is relevant before litigation is commenced." *Bloemendaal v Town & Country Sports Center, Inc.*, 255 Mich App 207, 211; 659 NW2d 684 (2003); *see also MASB-SEG Property/Casualty Pool, Inc. v Metalux*, 231 Mich App 393, 400; 586 NW2d 549 (1998). The Court of Appeals has also ruled that a court's inherent power to sanction for the spoilation of relevant evidence is not dependent on proof that the spoliation was intentional. *Hamman v Ridge Tool Co.*, 213 Mich App 252; 539 NW2d 753 (1995); *Brenner v Kolk,* 226 Mich App 149, 156-157; 573 NW2d 65 (1998).

The Court of Appeals has further held that where a plaintiff or a plaintiff's agent is responsible for the loss or spoliation of evidence, the circuit court has the discretion to penalize the plaintiff with any sanction appropriate under the circumstances, including the most severe of sanctions, outright dismissal of the claim. In both *Bloemendaal, supra* and *Citizens Insurance Co of America v Juno Lighting, Inc.*, 247 Mich App 236; 635 NW2d 379 (2001), panels of the Court of Appeals have affirmed the dismissal of plaintiffs' causes of action where the plaintiff or plaintiff's

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[2]Plaintiff has never seen the videotape and is, therefore, operating at an enormous disadvantage in attempting any discussion of its contents. However, based on Ms. Salsbury's deposition testimony, it is clear that the videotape does focus to some extent on the pump which was damaged before Mr. Banks' arrival. (Salsbury Dep., p. 62).

predecessor in interest was responsible for the spoliation of certain evidence.

An appropriate sanction must also be imposed in this case based on the defendants' failure to produce the surveillance videotape.

There is no question that the defendants would be subject to some sanction if this case were to proceed to trial and the videotape is never located. It is clear that if the defendants did not produce the videotape during trial, plaintiff would be entitled to an adverse inference based on MCivJI 6.01.[3]

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[3]MCivJI 6.01 provides:

a. (The [*plaintiff/defendant]* in this case has not offered *[the testimony of* [name]/[Identify exhibit.]*]*. As this evidence was under the control of the *[plaintiff/defendant]* and could have been produced by *[him/her]*, and no reasonable excuse for the *[plaintiff's/defendant/s*] failure to produce the evidence was given, you may infer that the evidence would have been adverse to the *[plaintiff/defendant]*.)

b. (The *[plaintiff/defendant]* in this case has not offered *[the testimony of* [name]/[Identify exhibit.]*]*. As no reasonable excuse for the *plaintiff's/defendant's]* failure to produce this evidence was given, you may infer that the evidence would have been adverse to the *plaintiff/defendant]*, if you believe that the evidence was under the control of the *[plaintiff/defendant]* and could have been produced by *[him/her]*.)

c. (The *[plaintiff/defendant]* in this case has not offered *[the testimony of* [name]/[Identify exhibit.]*]*. As this evidence was under the control of the *[plaintiff/defendant]* and could have been produced by *[him/her]*, you may infer that the evidence would have been adverse to the *[plaintiff/defendant]*, if you believe that no reasonable excuse for *[plaintiff's/defendant's]* failure to produce the evidence has been shown.)

d. (The *[plaintiff/defendant]* in this case has not offered *[the testimony of* [name]/[Identify exhibit.]*]*. You may infer that this evidence would have been adverse to the

Under that model instruction, the jury would be instructed that, because of the defendants' failure to produce the videotape, it "may infer that the evidence would have been adverse to the defendant." If this case were to proceed to trial, there is no question that a jury addressing the question of constructive notice, *i.e.* whether the defendant "should have known" of a problem with the pump before Mr. Banks used it, would be entitled to conclude that the videotape which defendants have failed to produce would have supported plaintiff's claim. Thus, if this case went to trial, the jury, properly instructed on the basis of MCivJI 6.01, could employ the adverse inference allowed by that instruction to decide the constructive knowledge question in Mr. Banks' favor.

This case presents a question associated with the adverse inferences available when a party loses or destroys evidence which, according to plaintiff's research, has never before been addressed by this Court - whether these inferences which unquestionably apply at a trial also have a role to play in the summary disposition process. Plaintiff would suggest that it makes no sense whatsoever to suggest that the defendants may be sanctioned *at trial* for their spoiliation of evidence, allowing the jury to draw a potential adverse inference on the issue of constructive notice, while at the same time allowing the defendants to avoid such a trial by filing a motion for summary disposition premised on the assertion that plaintiff does not have sufficient evidence of constructive notice. The defendants cannot be allowed to lose/destroy relevant evidence and thereafter dodge an adverse

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> *[plaintiff/defendant]* if you believe that the evidence was under the control of the *[plaintiff/defendant]* and could have been produced by *[him/her]*, and no reasonable excuse for *[plaintiff's/defendant/s]* failure to produce the evidence has been shown.)
>
> M. Civ. J.I. 6.01 (emphasis in original).

inference at trial on the issue of constructive notice by filing a motion for summary disposition which contests the quantity of the plaintiff's proofs on the very issue which a jury could decide against the defendants based on MCivJI 6.01's adverse inference.

Under these circumstances, there *must* be a sanction that applies to the pretrial stage of the proceedings, just as MCivJI 6.01 would be applicable at trial. As the Court of Appeals' decisions in *Bloemendaal* and *Juno Lighting* make clear, that sanction can in certain circumstances be severe. Plaintiff has not sought a sanction of comparable severity, a default, based on the defendants' failure to produce the videotape. But, there is no question that plaintiff is entitled to *some* sanction at this stage in the proceedings. Since plaintiff would be entitled to claim an adverse interference against the defendants at trial on the issue of constructive notice, a comparable sanction should be imposed at the pretrial stages of the proceedings as well. This Court should hold that the defendants are precluded from pursuing their summary disposition motion premised on constructive knowledge as a sanction for their spoliation of evidence relevant to that issue.

The Court of Appeals' treatment of this issue in its March 16, 2006 opinion is completely unsatisfactory. The Court of Appeals did not reject the notion that an adverse inference should be available in a summary disposition proceeding where a party loses or destroys relevant evidence. Nevertheless, the Court of Appeals ruled that plaintiff could not claim the benefit of any adverse inference in this case because "the videotape would have shown that another driver hit the pump before plaintiff used it." Opinion (Exhibit D), p.3. This evidence, according to the Court of Appeals, would not have benefitted the plaintiff because "it does not permit an inference that defendants had actual or constructive knowledge of the defect." *Id.*

This analysis of what the videotape might contain is utterly wrong. The simple fact is that

the video has never been supplied to the plaintiff. This means that the Court of Appeals engages in total speculation in suggesting as it does in its opinion what the tape *might* show. What is clear, however, is that the adverse inference provided in MCivJI 6.01 would allow a trier of fact to conclude that, whatever is on that tape, it would be adverse to the defendants. It is, in this context, absolutely senseless for the Court of Appeals to select one possible scenario for what the tape *might* reveal and, on the basis of that scenario, conclude that the missing piece of evidence would not prove helpful to the plaintiff.

The defendants are solely responsible for the loss of a relevant piece of evidence. Under these circumstances, the plaintiff is entitled to an inference that this evidence, if it had been produced, would have been adverse to the defendants. Moreover, plaintiff should be absolutely entitled to a determination that this unproduced evidence would have been adverse to the defendants ***on the issue of constructive notice.*** Theoretically, the videotape which the defendants have managed to lose could have revealed that after a car struck the pump and damaged it, one of the defendants' agents working in the stations's convenience store walked out of the store and examined the damage done to the pump, but did nothing further to make that pump inoperable before Mr. Banks used it. There is absolutely no question that such evidence would go directly to the notice issue involved in this case since it would have definitively established that the defendants' agents had actual knowledge of the defect.

Plaintiff is entitled to just such an adverse inference. Since it impossible to know precisely what that videotape would have revealed since the defendants have apparently lost it, plaintiff should be entitled at the summary disposition stage to the same type of inference which they would be entitled to at trial, an inference that the video would have supported plaintiff's assertion that the

defendants' agents either knew or should have known of the dangerous condition on their premises before Mr. Banks sustained his injuries.

The question of whether the defendants' loss/destruction of relevant evidence should be the subject of an adverse inference at the summary disposition stage represents an issue of first impression in this state and an issue of considerable significance to the law. The Court should grant leave to appeal on this issue.

RELIEF REQUESTED

Based on the foregoing, plaintiff-appellant, Michael Banks, respectfully requests that this Court grant his Application for Leave to appeal and give full consideration to the legal issues presented herein. In the alternative, plaintiff-appellant would request that this Court summarily reverse the Court of Appeals' March 16, 2006 decision and remand this matter to the Oakland County Circuit Court for further proceedings.

Respectfully submitted,

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